

Nos. 15-1074, 15-1130 [ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 15-1082, 15-1154 [ORAL ARGUMENT SET FOR DEC. 9, 2016]

**United States Court of Appeals for the
District of Columbia Circuit**

AMPERSAND PUBLISHING, LLC, D/B/A SANTA
BARBARA NEWS-PRESS,
Petitioner/ Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/ Cross-Petitioner,

GRAPHICS COMMUNICATIONS CONFERENCE
OF THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,
Intervenor.

Case Nos. 15-
1074, 15-1130

AMPERSAND PUBLISHING, LLC, D/B/A SANTA
BARBARA NEWS-PRESS,
Petitioner/ Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Case Nos. 15-
1082, 15-1154

On Petitions for Review and Cross-Applications for Enforcement of
an Order of the National Labor Relations Board

**MOTION TO CONSOLIDATE ORAL ARGUMENT AND ASSIGN TO
AMPERSAND, LLC V. NLRB, CASE NO. 11-1284 PANEL**

C.D. Michel (S.B.N. 144258)
Anna M. Barvir (S.B.N. 268728)
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Phone: (562) 216-4444
Fax: (562) 216-4445
E-mail: cmichel@michellawyers.com
Counsel for Petitioners

Pursuant to Federal Rules of Appellate Procedure, Rule 3(b)(2), Petitioner Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press (“the News-Press”), hereby moves to consolidate oral argument Consolidated Case Nos. 15-1082 and 15-1154 (“Case No. 15-1082”), which this Court recently set to be heard on December 9, 2016, with Consolidated Case Nos. 15-1074 and 15-1130 (“Case No. 15-1074”), wherein oral argument has not yet been set. Alternatively, the News-Press requests that the Court coordinate oral arguments in both cases so that they may occur before the same panel on the same day. *See, e.g., Davis v. DOJ*, No. 09-5189, 2009 WL 3570220 (D.C. Cir. Oct. 14, 2009).

The News-Press also separately requests that oral argument for both cases, whether consolidated or not, be heard by the same panel that decided *Ampersand Publishing, LLC v. NLRB*, Consolidated Case Nos. 11-1284 and 11-1348 (*Ampersand I*). Specifically, the News-Press requests that the panel include Circuit Judge Karen L. Henderson and Senior Circuit Judges David B. Sentelle and Stephen F. Williams.

Counsel for the NLRB in Case No. 15-1082 and counsel for the Intervenor in Case No. 15-1074 have indicated that their clients

oppose both requests. Counsel for the NLRB in Case No. 15-1074 had not yet responded at the time of this filing.

In its opening briefs in both appeals, the News-Press first represented that the two pending cases are related because they involve identical parties and share common core issues. The News-Press also argued that Case No. 15-1074 should be heard by the same panel that decided *Ampersand I* in 2012 because the parties are identical, the cases share common core issues, and “the charges at issue [here] are part of an ongoing pattern of harassment by the Union, under the authority of the Board, that began during the events of [*Ampersand I*] and continue to this day.” Petitioner’s Opening Brief at ii-iii, Case No. 15-1074 (May 16, 2016); Petitioner’s Opening Brief at ii, Case. No. 15-1082 (Jan. 21, 2016) (making a similar representation). For the reasons described below, the News-Press renews these requests to have the cases heard together and by the same panel that decided *Ampersand I*.

DISCUSSION

I. Consolidation of the Present Proceedings Is Appropriate

The Federal Rules “encourage consolidation of appeals whenever feasible.” Fed. R. App. P. 3(b), Adv. Comm. Notes (1967); *see also* Wright & A. Miller, Federal Practice and Procedure, § 2381 (2011) (explaining that in the analogous context of consolidation

pursuant to Fed. R Civ. Proc. 42, the Court has “broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties.”) In this circuit, the Court regularly consolidates “cases involving essentially the same parties or the same, similar, or related issues, . . .” D.C. Circuit Handbook of Practice and Internal Procedures 23-24 (2016). And it encourages consolidation, where feasible, to promote the “efficient use of the Court’s resources” and to “maintain consistency in its decisions.” *Id.* Because both matters involve the same parties and underlying facts and will likely turn on the same complex legal issue, consolidation of oral argument is necessary to promote judicial economy and harmony of this Court’s decisions.

Here, the parties to both proceedings are identical. The News-Press is the Petitioner/Cross-Respondent. The NLRB is the Respondent/Cross-Petitioner. And the Graphics Communications Conference of the International Brotherhood of Teamsters (“the Union”) and its counsel, actively participated in the administrative proceedings leading to the Board decisions under review in both cases.¹

¹ Although the Union is an Intervenor in only Case No. 15-1074, it was the charging party with respect to *all* the unfair labor

What's more, Case No. 15-1074 arises from a barrage of ULPs filed against the News-Press between November 2007 and March 2009. Case No. 15-1082 comprises a single ULP deriving from a discovery dispute that arose during the administrative action under review in 15-1074. And the News-Press' opening briefs in both proceedings retell very much the same story in their respective Statement of Facts sections. It is thus clear that both cases arise from related (and nearly inseparable) factual histories.

While the specific ULP allegations in each proceeding might differ, both matters boil down to the interplay between the News-Press' First Amendment freedom to control its editorial content and alleged violations of section 8(a) of the National Labor Relations Act ("NLRA"). In other words, they share a single core issue: Whether, pursuant to *Ampersand I*, the NLRB erred in finding the News-Press had violated the NLRA when it engaged in conduct to protect itself from the Union's unlawful attempts to seize editorial control from the News-Press in violation of the First Amendment? The NLRB and the Union disagree that this issue is determinative of either case. But that does not justify hearing the cases separately or by different

practices ("ULPs") at issue in each petitions under review. In each case, both the News-Press and the NLRB thus identified the Union as a party in their respective opening briefs.

panels. Quite the opposite. Just as the reasonable minds of counsel can differ as to the impact of *Ampersand I* and the First Amendment on these matters, reasonable panels might also reach opposite conclusions—leading to inconsistent holdings, a result that consolidation specifically exists to avoid.

In short, consolidation will make the most efficient use of this Court's resources. It will prevent two different panels from hearing and resolving two different cases brought by the same parties, based largely on the same facts and law, and involving the same central issue. Further, consolidation will avoid potentially inconsistent opinions on the legal issues both cases share.

II. The Court Should Assign Oral Argument to the Same Panel that Heard *Ampersand I*

When two or more “cases would normally have been consolidated, or at least joined for hearing . . . ,” the Clerk so “advises the panel to which the earlier case has been assigned. If the panel determines, in the interest of judicial economy and consistency of decisions, to take the new case, it will so advise the Clerk.” D.C. Circuit Handbook of Practice and Internal Procedures 48. Further, cases will be assigned to the same panel that heard a prior case when that case “set[s] the stage for the current dispute” or has become “intimately connected with the” instant case. *Tel. &*

Tel. Co. v. F.C.C., 659 F.2d 1092, 1094, n.8 (D.C. Cir. 1981) (noting that respondents' request for the case to be assigned to the same panel that had issued three prior decisions was granted). Here, it is in the interests of judicial economy and consistency for the *Ampersand I* panel to accept Case Nos. 15-1074 and 15-1082. And it is undeniable that *Ampersand I* is inextricably related to the pending Petitions for Review.

The previous panel's members are intimately and incomparably connected to the current matters, both of which share a common history with the *Ampersand I* dispute—one that reaches back at least a decade. Indeed, Circuit Judge Henderson and Senior Circuit Judges Sentelle and Williams became familiar with the same parties, underlying facts, governing law, and central issues that compose the two currently pending Petitions for Review. They studied the parties' briefs in *Ampersand I*, heard oral arguments, and penned a detailed First Amendment analysis that directly controls the outcome of the present proceedings. Assigning the present Petitions to the *Ampersand I* panel is necessary to maintain consistency with the 2012 opinion and to promote judicial economy, preventing a new panel (or panels) from having to wrestle with the long and tortured history of these cases and the complex constitutional questions at their core.

What's more, the events giving rise to the ULPs at issue in each of the current proceedings occurred *before* the previous panel issued its decision in 2012. More specifically, they were filed during a period in which both the Union and the NLRB still steadfastly clung to the position that their conduct was not violative of the News-Press' First Amendment rights and the Union was entitled to organize for the purpose of wresting editorial control from a newspaper's publishers. Because of this, it is reasonable to believe that the ULPs at issue in both cases were filed simply to further the Union's dogged quest for editorial control—conduct the *Ampersand I* panel decidedly rejected. Indeed, the NLRB decisions at issue seek to remedy alleged wrongs under the NLRA occurring during the same period as those dismissed by this Court in 2012. If the ULPs at issue in these cases had been brought together with those in *Ampersand I*, they too would have been summarily dismissed by this Court because of their inseparable relation to the First Amendment problem at the *very core* of this dispute. See *Ampersand*, 702 F.3d at 55, 59 (finding it impossible to parse the First Amendment and wage-and-hour issues here, the Court “vacate[d] the Board’s order and den[ied] the cross-application for enforcement *without addressing the parties’ arguments regarding the details of individual violations the Board found . . .*”) (emphasis

added). The timeline of the present disputes thus illustrates just how inextricably related all three cases truly are. It only makes sense that they should all be heard by the same panel now. Surely, had the present proceedings progressed to this Court four years ago, they would have been consolidated (or at least joined for oral argument) at that time.

CONCLUSION

Based on the foregoing, the News-Press respectfully requests:

1. That this Court consolidate for oral argument Consolidated Case Nos. 15-1074 and 15-1130 with Consolidated Case Nos. 15-1082 and 15-1154 or, alternatively, coordinate oral arguments in both matters so that they may occur before the same panel on the same day; and
2. That the panel that heard *Ampersand, LLC v. NLRB*, Consolidated Case Nos. 11-1284 and 11-1348, accept the Petitions for Review and Cross-Applications currently pending in Consolidated Case Nos. 15-1074 and 15-1130 and Consolidated Case Nos. 15-1082 and 15-1154.

Date: October 21, 2016

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
Anna M. Barvir
Counsel for Petitioner/Cross-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, an electronic PDF of MOTION TO CONSOLIDATE ORAL ARGUMENT was uploaded to the Court's CM/ECF system, which will send notice of filing to counsel for all participants in the case(s) who are registered CM/ECF users:

Ms. Linda Dreeben Ms. Elizabeth Ann Heaney Ms. Milakshmi Rajapakse National Labor Relations Board 1099 14 th St., N.W. Washington, D.C. 20570 appellatecourt@nlrb.gov Milakshmi.rajapakse@nlrb.gov	<i>Counsel for Respondent National Labor Relations Board Case Nos. 15-1082 and 15-1154</i>
Ms. Linda Dreeben Ms. Julie Broido Mr. Micah Jost National Labor Relations Board 1099 14 th St., N.W. Washington, D.C. 20570 appellatecourt@nlrb.gov micah.jost@nlrb.gov	<i>Counsel for Respondent National Labor Relations Board Case Nos. 15-1074 and 15-1130</i>
Mr. Ira L. Gottlieb Bush Gottlieb 500 N. Central Ave., Ste. 800 Glendale, CA 91203 igottlieb@bushgottlieb.com	<i>Counsel for Respondent National Labor Relations Board Case Nos. 15-1074 and 15-1130</i>

Date: October 21, 2016

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir

Anna M. Barvir
*Counsel for Petitioner/ Cross-
Respondent*